

5-7-1982

Transcript of proceedings Volume III, Part 2, pages 578-650

Wayne C. Lenhart
Court Reporter

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/walton>

Recommended Citation

Lenhart, Wayne C., "Transcript of proceedings Volume III, Part 2, pages 578-650" (1982). *Confederate Colville Tribes v. Walton (Colville Tribes)*. 55.
<https://digitalcommons.law.uidaho.edu/walton/55>

This Transcript is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Confederate Colville Tribes v. Walton (Colville Tribes) by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. VEEDER: I will ask another question.

Q. (By Mr. Veeder) What has been your experience during this period of the operation of the Lahontan Cutthroat Trout Fishery in regard to the quantity of waters required to maintain the fishery properly, and in regard to the maintaining of the temperatures that must be required to maintain the fishery?

A. Well, we have conducted egg incubating experiments in the gravels of No Name Creek; one that was prior to the renovation of the artificial spawning channel that was in place and working, and one which was in 1979, and in both events when these experiments were conducted the temperatures, ten days approximately after the initiation of the experiments, Mr. Walton began irrigating upstream and diverted the water, and our temperatures exceeded 60 degrees.

In both cases, in a matter of two days we just about eliminated our eggs that were incubating in the test.

Q. Did it eliminate all the eggs?

A. On the first occasion, yes, it did. On the second occasion, the temperatures exceeded 60 degrees for three days on those ten-day periods, and there was approximately, and I am recollecting now, approximately 20 to 25 percent survival of those eggs at that

1 time.

2 Q. Now, we were interrupted when you began to state into
3 the record the water requirements for quantification
4 as you view them today. Have you an opinion as an
5 expert of the quantity of water that would be required
6 to properly maintain this fishery?

7 A. Yes, I believe I stated --

8 Q. Would you repeat it because I am not too sure what
9 you got in.

10 MR. PRICE: Same objection for the record, sir.

11 THE COURT: Go ahead.

12 THE WITNESS: I stated from May 1 to June 1,
13 we needed --

14 THE COURT: I have that down. He said one cubic
15 foot per second from May 1 to June 1st; two cubic feet
16 per second from June 1st to July 15th.

17 THE WITNESS: There is one incorrect one. It
18 is 1.5 from May 1 to June 1, and two from June 1 to
19 July 1.

20 THE COURT: 1.5, all right.

21 MR. VEEDER: I have no further questions.

22 THE COURT: All right. Mr. Price?

23

24

25

CROSS-EXAMINATION

BY MR. PRICE:

Q. Dr. Koch, it was previously your testimony that the Lahontan Fishery as implanted into Omak Lake would survive with or without the No Name Creek artificial channel development, isn't that correct?

A. It depends on how you define survival.

Q. You testified that it would survive and what the No Name Creek channel development could do is possibly over the years maybe create a stronger species than otherwise would be there.

A. That's correct.

Q. You previously testified that, "from May until July 1, my recommendation has been that we should have approximately 1.5 cfs during the spawning attraction," the spawning attraction being May 1 to July 1st. Is that correct?

A. Previously, yes.

Q. And then we could cut it back to .4 or .5 cfs from then until the first of October, correct?

A. Right. The latest numbers are based on the observations of what has happened with the fishery since 1976.

Q. Those, your previous testimony is still appropriate assuming the water is there?

1 A. No.

2 Q. Assuming there is no interference with the delivery
3 of water either by the Tribe upstream or by the
4 Waltons upstream?

5 A. No. To maintain the proper temperatures, 58 to 68,
6 based on the flows of the temperatures that we have
7 seen over the last six years, these latest numbers
8 are what we feel can maintain those temperatures.

9 Q. And your previous testimony was that irrespective
10 of the fishery in the artificial channel below No
11 Name Creek, that the use of the fish hatchery, a
12 hatchery would have to be continued and utilized in
13 order to preserve the fish?

14 A. That's correct. No Name Creek by itself is not
15 enough substrength to provide the total population,
16 but it is very important in terms of maintaining
17 the genetic liability of the wild strain.

18 Q. Your previous testimony was that you had done some
19 studies. There had been some studies conducted
20 prior to selecting a stream that included Kartar
21 Creek and Beaverhouse Creek.

22 A. Yes.

23 Q. That those creeks were also found suitable for an
24 attempt to introduce fish through a natural stream,
25 were they not?

1 A. That's correct.

2 Q. In your opinion, as long as the water gets into the
3 channel and over the eggs, that's what you are
4 concerned about.

5 A. That's right, at the proper temperature.

6 Q. And it wouldn't bother the fish whether the water
7 went through the channel and over the eggs and over
8 the fish before it was taken out and put onto an
9 irrigation field, or if it went over the fish first
10 and then was taken out after it had gone through the
11 channel.

12 A. There are some basic problems with that basic conten-
13 tion in terms of the fishery.

14 Q. You say that wouldn't work?

15 A. I didn't say it wouldn't work, but I said there are
16 some potential problems. For example, if you put a
17 screeningwheel at the far ends of No Name Creek and
18 you would have to construct it in such a way that it
19 wouldn't get down and raw any saline water back from
20 the lake which would hurt your crops, and you would
21 have to do it also in such a way that you would
22 screen all of the fish coming upstream and downstream
23 from being churned up in the pump, and you would have
24 to sit on it 24 hours a day to keep the screens clean.

25 Q. Well, screening is used in irrigation practices

1 throughout the western United States, Mr. Koch.

2 A. But one of the biggest, single problems with screening
3 is the downstream passage of species, and this is
4 hydroelectric dams and everything.

5 Q. Screening is used in the Oroville-Tonasket District
6 off of the Okanogan River in huge pumps. It is used
7 in the conveyance of water for the beneficial use of
8 the land.

9 MR. VEEDER: Who is testifying now?

10 THE COURT: Mr. Price.

11 Q. (By Mr. Price) Is it not true?

12 A. This is true, but the passage of fish by these
13 facilities is the primary number one problem faced
14 by the salmon in the Columbia River Basin today.

15 Q. We are not talking about the Chief Joseph Dam and
16 screening in connection with those kinds of facilities,
17 are we?

18 A. You mentioned the Okanogan River.

19 Q. Dr. Koch, as a matter of fact, you previously testi-
20 fied that if the water were provided during incubation
21 period and through the hatching, May through July,
22 that the fish then within a month of incubation
23 approximately move down into the lake.

24 A. They tend to move downstream fairly soon, and then
25 they trail off, say, through September and October.

1 Q. If the water supply were withdrawn a month after
2 spawning, and say at the end of July, first of
3 August, the fish that had hatched would move into the
4 lake necessarily, wouldn't they?

5 A. If they can move downstream, yes, but we don't know
6 how successfully based on some research that we did
7 in 1974, in Pyramid Lake which is another alkaline-
8 saline lake very similar to Omak, we determined that
9 the Lahontan Cutthroat Trout couldn't successfully
10 go into those alkaline-saline waters until 90 days
11 after they were spawned.

12 Q. Your previous testimony was that they would move down
13 if the water source --

14 A. They would move down. We don't know how successful
15 their actual entrance into the lake would be.

16 Q. In calling your attention to a previous exhibit,
17 I believe 37(9), it is entitled, "An Evaluation of the
18 Lahontan Cutthroat Trout Population with Recommended
19 Management Alternatives for Omak Lake, Washington,
20 by David L. Koch," are you familiar with that study?

21 A. Yes.

22 Q. And do I need to show that to you?

23 A. It's a photocopy.

24 Q. And at Page 25 of that study, Dr. Koch, is it Koch or
25 Coke (phonetic)?

1 A. Cook (phonetic).

2 Q. Dr. Koch, it reads in part -- would you read the
3 middle paragraph of that Page 25, please? Would you
4 read it into the record, please?

5 A. (Reading) "In experiments conducted last year at
6 Pyramid Lake (Koch and Knoll, 1974), the Lahontan
7 Cutthroat Trout were tested for adaptability and
8 growth in various solutions of Pyramid Lake water.
9 The results indicated that the fish are quite
10 adaptable when taken from fresh water and placed
11 directly into Pyramid Lake water 90 days after
12 hatching. Their growth rate over a 60-day period was
13 greatest in Pyramid Lake water and successively
14 slower in greater dilutions."

15 Q. In other words, what that is saying is that the
16 fish actually benefited by the introduction of saline
17 water at a period of time.

18 A. That's correct, after the 90-day period in fresh
19 water.

20 Q. All right. There is nothing in your record to
21 indicate that they couldn't move down sooner than a
22 90-day period, is there?

23 A. It just said that.

24 Q. All right. That's all I have.

25 A. They tested those in various time sequence of intro-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ductions into lake water.

Q. There is nothing in your record to indicate that the fish will not survive and grow moving down into the saline water within a month of this incubation, is there?

A. Well, they don't do very well at that stage because physiologically, they are not adapted for that yet.

MR. PRICE: That's all I have. Thank you, Dr. Koch.

THE COURT: Mr. Sweeney?

MR. SWEENEY: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SWEENEY:

Q. Dr. Koch, this testimony as to the water requirement for the maintenance of the Lahontan Fishery is somewhat different than you testified to at the earlier trial; is that correct?

A. That's correct, because at the first trial we had only had one year experience of it, and now we have got six years where we have observed the data and what actually happens.

Q. Yes. I understand the reasons for your, or why you differ now.

Basically, how much water in acre feet would

1 be required under the testimony that you submitted at
2 the earlier trial?

3 A. I believe it was around 280, 290 acre feet.

4 Q. Okay. These calculations that you gave us today for
5 regime of water requirement for the Lahontan Trout
6 commencing in the first of May and ending about October
7 1? How many acre feet does that represent?

8 A. I believe that translates to about 345 or 350 acre
9 feet.

10 Q. So, that would be the water requirement for the
11 maintenance of the Lahontan spawning area?

12 A. Right, and rearing.

13 Q. And rearing? That's proper, the period from May 1st
14 to October 1st?

15 A. Right.

16 Q. At certain periods, for instance, from May 1st to
17 June 1st, it requires 1.5 cfs; is that correct?

18 A. That's correct.

19 Q. That's about 1 cfs above what I guess we have talked
20 about as the natural flow; is that correct?

21 A. That's correct.

22 Q. Then, from June 1st until the 15th of July, it
23 requires 2 cfs?

24 A. That's correct.

25 Q. Which is one and one-half cfs above the natural flow,

1 and then it would drop down to the natural flow from
2 15 July to October 1st?
3 A. That's correct.
4 Q. Now, the Lahontan program in Omak Lake was commenced
5 when?
6 A. 1968.
7 Q. At that time, however, it did not include the arti-
8 ficial spawning grounds in No Name Creek.
9 A. No, 1968, they just put in the first test group of
10 fish.
11 Q. And thereafter, how was the population of the Lahontan
12 Trout maintained in the lake?
13 A. It was maintained based on deriving an egg supply from
14 Nevada to raise or to get the initial population
15 going up until 1971, I believe, at which time they
16 started taking the egg supply right from Omak Lake.
17 Q. Then, they went to the Winthrop Hatchery?
18 A. That's correct.
19 Q. When did the Lahontan Trout spawning grounds in the
20 No Name Creek commence? When did that start?
21 A. That was developed in 1976.
22 Q. Okay, and it has been maintained ever since?
23 A. That's correct.
24 Q. Has the hatchery also been utilized ever since?
25 A. That's correct.

1 Q Now, would you state into the record your background
2 and responsibilities in regard to the Colville
3 Irrigation Project, including the Colville Lahontan
4 Cutthroat Trout Program?

5 MR. PRICE: Excuse me, Your Honor, could I hear
6 that question?

7 MR. VEEDER: I asked him to state into the record
8 his responsibilities in regard to the Colville
9 Irrigation Project, including the Lahontan Cutthroat
10 Trout Project.

11 MR. PRICE: Your Honor, I am going to object
12 to this testimony as not being pertinent or relevant
13 to the issue on Remand.

14 Mr. Corke is a hydrologist with an office
15 back in Washington, D.C., and I suggest that the
16 issue of irrigable acreage and how the Court may
17 prorate, if it ever gets to that position, water is
18 not something that Mr. Corke can enlighten us about.

19 THE COURT: Yes. What, Mr. Veeder, is the
20 purpose of Mr. Corke's testimony? What do you seek
21 to prove by it?

22 MR. VEEDER: I wish to proceed into the record
23 to elicit testimony in regard to the methods of
24 allocating the waters of No Name Creek within that
25 area, and to request his expert opinion as to whether,

1 under the circumstances prevailing, it would be
2 appropriate to apportion the water on the basis of
3 irrigable acreage, and what the consequences would
4 flow from that kind and type of allocation, and whether
5 he has knowledge in regard to the distribution of
6 water in the Ahtanum Creek, which was referred to by
7 the Court of Appeals for the 9th Circuit, and he,
8 as an expert, knows and can testify in regard to
9 whether there is any project of which there are 120
10 in the country that are presently apportioning water
11 on the basis of irrigable acreage.

12 THE COURT: Well, I think, first of all, I think
13 that's a misnomer to say that water would necessarily
14 be apportioned between the needs of the fishery
15 system and the water for irrigation.

16 The question is as to whether in this case,
17 and I don't know what the questions are in the other
18 cases you are talking about, but the issue in this
19 case goes back to the root of the rights of an
20 allottee to reserve water rights with an effective
21 date as the date of the creation of the reservation
22 for a certain purpose, and then if the holders of
23 other reserve rights have multiple uses for it such
24 as the Tribe here, or if the Tribe wasn't leasing
25 these allotments, the other allottees, and they reserve

1 to reserve a portion of their water or whatever water
2 they have to for one purpose or another, that's their
3 prerogative.

4 But, my concern is how you can dilute the
5 reserve rights in the allottees by various type
6 changes or increases without regard to the amount
7 reserved to that allottee for other purposes.

8 I think the allottees' rights which the
9 Circuit indicated are very important would be
10 illusory if that was the case, so I don't think that
11 Mr. Corke's testimony is going to help me a great deal
12 in determining the fundamental question here after
13 we get by the question of what water rights the
14 parties have as to how they would be, if and how they
15 would be prorated.

16 I think that is a question of law that I
17 have to decide. Now, again, I am telling you, and
18 as I told you before, we had two days to present
19 this hearing, and we are into the third day. I have
20 a calendar for the entire afternoon, so we better
21 move along.

22 MR. VEEDER: I am anxious, too.

23 THE COURT: Now, if you have other areas of
24 testimony that Mr. Corke is concerned with, but I
25 think it is my job, right or wrong, to decide how this

1 water is to be allocated, and whether they have done
2 it that way on other reservations, I don't think is
3 necessarily pertinent here.

4 MR. VEEDER: Well, I would like to make an offer
5 of proof then.

6 THE COURT: All right. Why don't you go ahead
7 if you are just going to be a few minutes, you might
8 as well put in the testimony.

9 MR. VEEDER: I would like very much to move this
10 along.

11 Q. (By Mr. Veeder) Would you state into the record the
12 concepts that were in your mind when you decided to
13 build a project which would -- that is the Colville
14 Irrigation Project -- which would be primarily
15 utilized, primarily utilized pumping as a method
16 of securing water for the No Name Creek stream and
17 utilize pumping almost exclusively for the delivery
18 of water to the irrigable acreage owned by the
19 Colville Confederated Tribe and its members?

20 MR. PRICE: Your Honor, I am going to have to
21 object. I am sorry to again do this, but what was
22 in his mind has no relevance to this proceeding.

23 There is no basis for any cross-examination
24 by us as to --

25 MR. VEEDER: I will start right in again.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Well, the question is extremely
difficult to respond to. Maybe we could --

Q. (By Mr. Veeder) What was the design of the project
and the reasons for the design of the project that
is as it is now constructed and operated, Mr. Corke?

MR. PRICE: That is ostensibly in the record,
Your Honor. Mr. Corke has testified from a political
point of view and an editorial point of view at some
length before, and I assume that's what we are trying
to get into the record. That's the only reason he
can be here for, and I object strenuously to this
line of questioning.

MR. VEEDER: Now, I am at the clock again, Your
Honor.

THE COURT: Let's move along.

Q. (By Mr. Veeder) Would you answer the question, Mr.
Corke?

A. As soon as we discovered the dimensions that -- we
had an underground aquifer and determined its dimen-
sions, the decision was made to construct a water
development project utilizing that aquifer as an under-
ground reservoir to supplement the base flow, the
natural flow in the stream, which as we mentioned
yesterday, would amount to 100 -- some 180 acre feet
during the six-month growing season.

1 Pumps were put into the aquifer, and those
2 waters have been used for the benefit of the Colville
3 Indians, their agricultural project, and their
4 fishery enhancement program.

5 Q. Now, Mr. Corke, in the design of that project, what
6 was the immediate result of utilizing the ground water
7 basin as an underground storage basin in regard to the
8 yield of the water from the stream?

9 A. We are able to store very efficiently and effectively
10 waters which would otherwise be lost through runoff
11 during the non-irrigation season, the off-irrigation
12 season by intercepting and filling that reservoir,
13 and then drawing it down during the following year
14 irrigation season for use by the Colville Indians.

15 Q. Now, what would be the result, in your opinion, of
16 prorating that additional water supply that has been
17 created by the Colville Irrigation Project if it were
18 allocated between the Indians and non-Indians? What
19 would be the consequence?

20 MR. PRICE: I object to the form of the question,
21 Your Honor. We are now into the illusion of storage
22 of water by the Tribe in an attempt, apparently, to
23 adopt a new, legal theory that these are stored
24 waters.

25 There has never been any allegation that

1 these are stored water, but the Tribe at the trial of
2 this matter testified there were only 500 acre feet
3 annually available on a long-term basis, and that
4 this aquifer was going to be mined if it was utilized
5 in the manner that Judge Neill decreed.

6 Now, the form of the question is that these
7 are stored waters. There is no testimony as to the
8 fact of any storage of any interception of waters or
9 manipulation of waters to store them. In fact,
10 just the opposite is in the record of this trial.

11 THE COURT: I am considering this to be an
12 overall aquifer source. Secondly, the question was
13 couched to get the witness' opinion as to the
14 difference of allocating between Indians and non-
15 Indians.

16 I think the issue here is, to such ever
17 extent, if any, that the Walton properties are
18 entitled to reserve water, they stand in the same
19 position as the allottees, and I think your question
20 would be improper there, too, Mr. Veeder.

21 Perhaps you ought to start over again.
22 Your question contemplated the witness' opinion as
23 to prorating water between Indians and non-Indians.
24 That's not what we are talking about here.

25 MR. VEEDER: May I explain the question?

1 THE COURT: Well, why don't you ask another one?

2 MR. VEEDER: Well, I would like to have that
3 question answered because I am saying that on the
4 basis of the 9th Circuit Opinion, there is nothing
5 in the 9th Circuit Opinion that says that where the
6 Tribe, working with the trustee, develops a supply of
7 water through the storage in the aquifer, that that
8 water should be allocated to the non-Indians.

9 This money was made available for the
10 Indians, and not for the non-Indians.

11 THE COURT: This was all tried once, wasn't it?

12 MR. VEEDER: Your Honor, this was never tried.

13 MR. PRICE: That's exactly right. It never came
14 up, Your Honor, until this rehearing, and it is an
15 attempt to now go into stored waters which was never
16 alleged in the trial.

17 THE COURT: Well, I will tell you that I have
18 reviewed this case, and I am getting a little tired
19 arguing about it.

20 The Circuit has laid down criteria that I
21 think I am obligated to follow, and the Circuit has
22 said that there is a watershed here, and the Indian
23 allottees and their successors and the Tribe as
24 lessee of the allottees share in that on a certain
25 formula set forth in the Opinion, and whether you call

1 it stored waters, or whether we call it an aquifer, or
2 a watershed, I don't think that's going to change
3 that, but if you go ahead and rephrase your question
4 and move along --

5 MR. VEEDER: I will move along. I will make it
6 very clear that we don't believe that the due diligence
7 aspect that they participate in the stored water.

8 Q. (By Mr. Veeder) Would you answer the question, Mr.
9 Corke? I will go back and start it again.

10 Mr. Corke, has there been an increase in
11 the available supply of water in the No Name Creek
12 Basin for utilization on the Tribe and the members'
13 lands by reason of the way you designed and operate
14 the project?

15 A. That's very true, with the extent of the pumping.

16 Q. That has been increased in what manner?

17 A. By the utilization of waters stored in the underground
18 aquifer and delivered into the stream and applied to
19 the agricultural lands.

20 Q. Now, Mr. Corke, would you state into the record the
21 general practices, the practices that are adhered
22 to -- I will start again on this.

23 How many Indian projects are there?

24 A. Approximately 120 varying from major ones of 100,000
25 acres, down to those with a few hundred acres.

1 Q. Do you have knowledge as to whether any of those
2 prorated on the basis of irrigable acreage?
3 A. None, none prorated on the basis of irrigable acreage.
4 Q. Now, why would that be?
5 MR. PRICE: I am going to object, Your Honor.
6 THE COURT: I think we are getting into an area
7 we would have to go into all of the details of all
8 these other transactions as to the respective owners,
9 their rights, and whether it was all Tribal land or
10 not Tribal land. Where would we be heading in that?
11 MR. VEEDER: I would like to ask just one
12 question. Then, if there is an objection to that
13 question, I will ask the final question in this
14 regard.
15 Q. (By Mr. Veeder) Are you familiar with the operation
16 of the project referred to by the 9th Circuit?
17 A. Yes, I am.
18 Q. Now, is that water distributed on the basis of
19 irrigable acreage to your personal knowledge?
20 A. During short periods of time it is not distributed
21 on the basis of irrigable acreage. It is not even
22 distributed on the basis of irrigated acres.
23 Q. And how is it allocated then?
24 A. It is allocated on the basis of a number of factors
25 and a judgment call taking into account the land, its

1 location, the soil characteristics of that land, the
2 crops growing on it, their value, their tolerance
3 to drought.

4 THE COURT: Has the administrative agency gone
5 into the Lahontan area with certain controls?

6 THE WITNESS: It is a judgment shot based on the
7 situation at each time the water gets critically
8 short.

9 THE COURT: But, there is an administrative
10 control over the Lahontan unit?

11 THE WITNESS: Yes. It is a unit of the Big
12 Wapato Irrigation Project.

13 THE COURT: Well, in any event you have --

14 Q. (By Mr. Veeder) As an expert, do you have an opinion
15 as to whether the water in the No Name Creek area
16 within the Colville Irrigation Project could be
17 properly administered on the basis of irrigable
18 acreage?

19 MR. PRICE: I'm going to object to that. There
20 is no foundation for that, Your Honor. It would take
21 us a lengthy time to go into any foundation, and it
22 is still objectionable.

23 THE COURT: Well, yes. I would think if the
24 government elects to exercise its jurisdiction it
25 might very well go in and regulate it in one way or

1 another, but as far as I know, they haven't done that.

2 I don't see what that has to do with this
3 lawsuit, but I will let him answer the question, if
4 you can, sir.

5 THE WITNESS: Yes. I do have an opinion.

6 Q. (By Mr. Veeder) Would you speak up, please?

7 A. Would you restate the question?

8 Q. Do you have an opinion as an expert whether it would
9 be an appropriate method to distribute the water in
10 the Colville Water District and also the Walton
11 lands on the basis of the irrigable acreage?

12 A. Yes, I do have an opinion.

13 Q. Would you state into the record what that opinion
14 is?

15 A. That it would not be appropriate. It is unrealistic
16 and unworkable.

17 Q. What would be the consequence of attempting to dis-
18 tribute water that way?

19 A. There would be a tea cup for nearly every acre on
20 short occasions, and some lands would be given more
21 water than they should be given and could use bene-
22 ficially, and others would be drastically short.

23 THE COURT: I might as well state into the
24 record here that I permitted Mr. Corke to answer that
25 question, but I think that question fundamentally has

1 been resolved in this particular litigation, but go
2 ahead. Is that it?

3 Q. (By Mr. Veeder) Would you state into the record if
4 you have noted the kind and type of vegetation on
5 the Walton property? What is the kind of vegetation
6 you observed throughout most or throughout the entire
7 Walton property?

8 A. Much of the acreage, particularly downstream from the
9 Waltons' entrance road is growing vegetation that you
10 normally expect by water-loving plants and a high
11 water table, and as you go further down the vegetation
12 becomes less desirable, less palatable and nutritious
13 for the livestock.

14 Q. Have you observed this situation throughout the
15 western United States?

16 A. It's typical of areas with high water tables and
17 saline conditions. Vegetation of that type grows
18 on every irrigation project where there are seeps
19 and where there is accumulations of tail waters.

20 Q. Now, have you ever observed as an expert -- how
21 many years have you been in this business?

22 A. I have been in this business since I got out of
23 college in 1948.

24 Q. Have you ever observed the cutting of the kind and
25 type of growth you witnessed on the Walton property,

1 the rye grass or wheat grass, whatever they call it?
2 Have you ever seen that growth utilized and cut as
3 hay for livestock?

4 A. Livestock?

5 MR. PRICE: Your Honor, I am going to object.
6 Again, we are far out of bounds --

7 THE COURT: There is no foundation.

8 MR. PRICE: -- for operating a dairy or anything
9 that is related to the No Name Creek Valley.

10 THE COURT: I will sustain the objection.

11 MR. VEEDER: If the witness were permitted to
12 answer the question, he would point out that the --

13 MR. PRICE: Your Honor, I don't think that
14 Counsel should be permitted to testify into the
15 record when the Court has sustained the objection.

16 THE COURT: I don't think there has been a
17 foundation, and also we have gone into this hay grass
18 and the nature of this soil four or five times in this
19 case. It is cumulative, in addition to other things.

20 MR. VEEDER: I think I have a right to make an
21 offer of proof.

22 If this witness were permitted to testify
23 he would say that the growth on the Walton property,
24 throughout most of it, is the kind and type of
25 vegetation that is not fit for livestock feed, and

1 that it is a gross waste of water to have any water
2 allocated to that kind and type of growth that pre-
3 dominates throughout the entire Walton property.

4 THE COURT: All right. The objection is still
5 sustained on the basis that the testimony can be at
6 best cumulative, and secondly, there is no proper
7 foundation to show that the witness is proper to
8 answer. Okay.

9 Any cross-examination?

10 MR. PRICE: No questions, Your Honor.

11 MR. SWEENEY: No questions, Your Honor.

12 THE COURT: You may be excused.

13 MR. VEEDER: I renew the Motion we filed
14 originally when the defendant rested on the grounds
15 that the evidence that is in the record now, which
16 certainly hasn't changed by anything that has been
17 offered, is too clear for question that the Whams
18 for a period of 20 years did not use water in any
19 quantity that would interfere with the delivery of
20 water down to the Timentwa properties on Allotments
21 901 and 903.

22 THE COURT: Are you closing your case now?

23 MR. VEEDER: Yes.

24 THE COURT: All right.

25 MR. PRICE: Your Honor, in view of what you have

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

said about our time constraints, we would have some brief rebuttal from Mr. Walton.

THE COURT: Just so everyone will understand, Mr. Veeder, obviously at this stage of the proceedings I understand that you are protecting the record, but at this juncture, I am not going to grant any dispositive motions. I am going to give this matter some serious thought, but I would like to finish the testimony and then proceed with anything you want on the record.

The government has no evidence, I understand, Mr. Sweeney?

MR. SWEENEY: We have some documents to present, but no testimony, Your Honor. They are certified files from the BIA.

THE COURT: Have they been reviewed with counsel?

MR. SWEENEY: I believe most of them have been put in in part.

THE COURT: Let's finish the testimony anyway.

You are resting, Mr. Veeder?

MR. VEEDER: I am resting, yes.

1 WILLIAM BOYD WALTON, recalled as a witness in
2 rebuttal on behalf of the
3 defendant herein, having been
4 previously duly sworn, resumed
5 the stand and testified further
6 as follows:
7

8 DIRECT EXAMINATION

9 BY MR. PRICE:

10 Q. Mr. Walton, you identified Defendants Exhibits RRRR,
11 PPPP, QQQQ, and SSSS?

12 A. Yes, I did.

13 Q. And those exhibits range from the period of 1949,
14 through 1951, or '53?

15 A. 1981.

16 Q. All right. Prior to 1981, what is the most recent
17 date?

18 A. 1951.

19 Q. All right. In the acreages that you have testified
20 to that you have depicted on those exhibits, as well
21 as Defendant Walton's Exhibit T-W, did you utilize
22 any lands not within the outer boundaries of the
23 legal description of your property?

24 MR. VEEDER: I am going to object to this question.
25 It refers to the Walton's Exhibit T-W.

1 Now, it was represented to this Court and
2 to Counsel that Exhibit T-W --

3 MR. PRICE: No, Counsel. You are thinking of
4 U-W, which is a picture similar to that one.

5 MR. VEEDER: I want to refer to this because the
6 witness went through the whole scheme using this
7 photograph in regard to T-W and represented to us,
8 utilized in the testimony of Mrs. Johnson who is the
9 daughter of Mrs. Wham that they had sought to under-
10 take to identify the lands that Mrs. Johnson was
11 testifying to, they utilized a totally different
12 photograph that was handed to counsel, all of her
13 testimony, and I move to strike all of it.

14 THE COURT: Wait a minute, we are getting our
15 motions mixed up here. I thought you were objecting
16 to a question.

17 MR. VEEDER: I am objecting to a question that
18 the witness is now testifying to the acreages depicted
19 at least in part from this photograph on Exhibit T-W,
20 which had the locations of acreages that he pointed
21 to.

22 Now, there is a tremendous flaw in all of
23 the evidence that Mr. Walton put in, and in regard to
24 the Waltons, testimony from Mrs. Johnson, and I have
25 to have -- I want the record to show that there was an

1 intentional misrepresentation as upon the basis upon
2 which Mr. Walton is now going to testify at, and in
3 regard to the basis upon which part of this evidence
4 was offered and accepted into the record.

5 THE COURT: Well, I certainly don't understand the
6 objection, but I am going to overrule it and permit
7 him to answer the question. We will thrash it out
8 later.

9 MR. PRICE: I am preparing a Motion for Contempt
10 against Mr. Veeder. I want the record to reflect
11 that in chambers prior to undertaking the presentation
12 of testimony in this matter, Mr. Veeder referred to
13 the 9th Circuit Decision as "anarchy." He has accused
14 me personally of conspiring with the government at a
15 time when the government asked for a continuance when
16 I had not even been in contact with the government.

17 He accused me and my client of conspiring
18 with the government against the Tribe in concocting
19 legal doctrines, which is not the case. He now
20 accuses the Waltons and me of intentionally misrepre-
21 senting something to the Court.

22 The man has no respect for any rules of
23 professional conduct or professional responsibility.
24 His whole action and conduct holds the Court in
25 disregard and distaste. I find it offensive to have

1 to put up with this man's anarchy, his failure to
2 abide by the Court's rulings, his overprosecution
3 of the case, and I intend to see that this matter is
4 prosecuted forthwith.

5 MR. VEEDER: I certainly have a right to respond
6 to this. I don't care about that clock or if it ever
7 runs.

8 THE COURT: Now, sit down.

9 MR. VEEDER: I'm not going to be attacked by this
10 character --

11 THE COURT: Now, wait a minute. Sit down, both
12 of you for a moment.

13 Now, you made an extensive discussion or
14 motion or whatever it was, Mr. Veeder, in which you
15 accused, I gather, Mr. Walton --

16 MR. VEEDER: No, no, the lawyer.

17 THE COURT: All right. He responded to it. I am
18 not going to hear any more about it. You can respond
19 in writing or do whatever you want to do. I am going
20 to finish this testimony and we are going to get it
21 done one way or the other.

22 Now, go ahead, Mr. Price.

23 Q. (By Mr. Price) Mr. Walton, my question was the
24 exhibits that we just referred to, Exhibits QQQQ,
25 SSSS, PPPP related to Exhibit T-W.

1 Did you calculate any lands that were
2 outside of the outer boundaries of the legal descrip-
3 tion of your property?
4 A. No, I did not.
5 Q. So, the irrigable --
6 MR. PRICE: Excuse me, Counsel. I am going to
7 have to use that.
8 Q. (By Mr. Price) So, you used the lands wholly within
9 the outer boundaries of your property?
10 A. For my getting the acreages on T-W, wholly within the
11 bounds of my property, yes.
12 Q. Showing you what is marked Defendant's Exhibit U-W,
13 do you recognize that photograph that has been
14 admitted into evidence?
15 A. Yes, I do.
16 Q. Comparing it with the photograph that is enframed
17 and being held up to you, does that depict the same
18 area?
19 A. Yes, it does.
20 Q. Was it taken at approximately the same time?
21 A. Yes, it was.
22 Q. When was the first time you realized that it was not
23 the exact date?
24 A. Yesterday in court.
25 Q. All right. Would you tell the Court how you can tell

1 that it was taken at almost the identical time?

2 A. The year before, the upper end of this field had
3 gotten crown rot and I had plowed it out. It appears
4 on both photographs, and I plowed it out in the spring
5 of 1978, and replanted it.

6 Looking at the photographs, they look the
7 same; however, if you look at this field at the bottom
8 of the picture it appears much greener, and I have
9 mowed the field in this picture when the photograph
10 was taken, and in this picture it has the brown strip,
11 so it indicates to me that the field was plowed up in
12 '78. However, the field has not been mowed, so there
13 is a discrepancy of a few days in the photograph.

14 Q. Do the photographs depict the same boundaries from the
15 north boundary line to the south boundary line of your
16 property?

17 A. Yes, it does.

18 Q. And the east to west boundary lines?

19 A. Yes, it does.

20 Q. Those depict the same fields that Mrs. Johnson
21 testified to?

22 A. Yes, it does.

23 MR. PRICE: That's all. Okay. Thank you.

24 Q. (By Mr. Price) Mr. Walton, the exhibits, the four
25 alphabetic lettered exhibits depict that there was a

1 change from rill irrigation to sprinkler irrigation
2 over a period of time from 1949, through 1951; is that
3 correct?
4 A. Yes, there does.
5 Q. What accounted for that, please?
6 A. The possibilities of using electric power and aluminum
7 irrigation pipe.
8 Q. All right. Are there areas on your property that have
9 a high water table?
10 A. Yes, there are.
11 Q. Those areas have been taken into consideration by the
12 Soil Conservation Service in developing your irrigation
13 program for your father?
14 A. They have been taken into consideration by the U.S.
15 Soil Conservation Service, and also by me.
16 Q. Do you make your living off of this property?
17 A. Yes, I do.
18 Q. Did your father make his living off of this property?
19 A. Yes, he did.
20 Q. If you overirrigate a crop, what happens to it?
21 A. You kill the crop.
22 Q. Have you been embarked on a program to kill your crops
23 from 1949, through the present time?
24 A. No, I have not.
25 Q. Have you had or made any attempt -- do you have any

1 motive or attempt to maximize your profits?

2 A. Yes, I have.

3 Q. In terms of the streamflow of No Name Creek, you came
4 to the property in 1949, and there was a streamflow
5 there, is that not correct?

6 A. Yes, there was.

7 Q. Were there any wells utilized by the Tribe or anybody
8 else to the north of you for irrigation pumping
9 purposes?

10 A. No, there was not.

11 Q. The stream naturally occurred in a state of nature
12 to the north of your property, and in springs within
13 your boundary line?

14 A. Yes, it does.

15 MR. VEEDER: I object to this, Your Honor. This
16 is not direct. This is totally cumulative. We have
17 been through this fifteen times.

18 THE COURT: No. I think it probably goes to the
19 impact of the upper pumping on the aquifer, I gather
20 is where you are going. I will overrule your objec-
21 tion.

22 Q. (By Mr. Price) Mr. Walton, did you install some
23 pumps in the northern portion of your property prior
24 to the time that the Tribal pumping program went
25 into effect?

1 A. Yes, I did.

2 Q. Did you install two pumps near your northern boundary

3 line?

4 A. I installed two wells near my northern boundary line.

5 Q. Thank you. Those were installed when?

6 A. 1968, and 1975.

7 Q. Did you pump from those wells between '68 and '75?

8 A. Yes, I did.

9 Q. What was the effect on the flow of No Name Creek?

10 A. No visual change from a specific day in one year to

11 a specific day in another year.

12 Q. How many gallons per minute would you pump, let's say,

13 in the well you put in in 1968?

14 A. Its maximum flow was 250 gallons a minute.

15 Q. How about the later well; what was the capacity of

16 that well for pumping?

17 A. I cannot utilize the capacity of that well. I

18 normally utilize around 300 to 400 gallons a minute.

19 Q. Did that well always produce sufficient waters for your

20 purposes prior to the Tribe's irrigation project

21 going in?

22 A. Yes, it did.

23 Q. Has that been true since the Tribe's irrigation project

24 has been in place?

25 A. No.

1 Q. Mr. Walton, was a weir installed in your property in
2 1975, as testified to by Mr. Watson by the U.S.
3 Geological Survey?
4 A. Yes, it was.
5 Q. Was it utilized for measuring the flow of No Name
6 Creek in part?
7 A. Yes.
8 Q. Did the figures supplied or obtained by the United
9 States Geological Survey from that weir give you any
10 information as to the flow of No Name Creek in 1920's,
11 '30's, or the 1940's?
12 A. My summation is that there is no correlation between
13 the flow -- a specific date in 1975 --
14 MR. VEEDER: Object to this. This witness is
15 not a qualified hydrologist, and I am opposed to his
16 effort for him to constitute himself as a hydrologist
17 or to project or analyze upon water available in No
18 Name Creek drainage.
19 Certainly, he cannot project backwards
20 antecedent to when he was six years old, and that's
21 what he's trying to do.
22 MR. PRICE: I thought that's what Mr. Watson was
23 trying to do, Mr. Veeder. I can speed this up, Your
24 Honor, by just --
25 THE COURT: All right.

1 MR. PRICE: -- just asking the question again.
2 Maybe the witness could be more responsive to my
3 question.

4 MR. VEEDER: Has the question been withdrawn?

5 MR. PRICE: Yes.

6 THE COURT: Starting a new question?

7 Q. (By Mr. Price) Did the information supplied to you
8 by the United States Geological Survey based on their
9 recordings through the weir in 1975, give you any
10 information as to the flow of No Name Creek in 1920's,
11 '30's, or the 1940's?

12 A. No.

13 MR. VEEDER: I object to this. The witness is
14 not qualified. We are trying to qualify him as a
15 hydrologist.

16 THE COURT: He answered the question, "no."

17 MR. VEEDER: What?

18 THE COURT: He answered the question, "no."

19 MR. VEEDER: He shouldn't have been asked the
20 question. He is fast on the answer, Your Honor.

21 THE COURT: We don't need a lot of colloquy.

22 Q. (By Mr. Price) Mr. Walton, you have indicated on
23 Exhibit, the 1951 exhibit, please, if you will give
24 me the number --

25 A. QQQQ.

1 Q. Approximately 112 acres of irrigation.
2 A. That's correct.
3 Q. Both the sprinkler and rill irrigation?
4 A. That's correct.
5 Q. And did you continue to irrigate those, you and your
6 father continue to irrigate those fields until the
7 present time?
8 A. No.
9 Q. All right. Have there been decreases and increases
10 from time to time?
11 A. Yes, there have been.
12 Q. All right. On what basis?
13 A. The available soil moisture in any particular year,
14 the cost of the cattle feed, and the price we receive
15 for our milk.
16 Q. In connection with the alkaline soils on your property,
17 is there or is there not anything that sprinkler
18 irrigation can facilitate with respect to those lands
19 that cannot be accomplished with rill irrigation?
20 A. Yes, there is.
21 Q. What is that, please?
22 A. To quadruple or multiply to a large amount the amount
23 of usable crops for the cattle.
24 Q. If you did not irrigate the fields that you have
25 indicated are irrigable, the acres that you have

1 indicated are irrigable, would those fields produce
2 sufficient crop products for the needs to sustain
3 your farm?
4 A. No, they would not.
5 Q. Were you and your father irrigating in the year 1963?
6 A. Yes.
7 Q. In '62?
8 A. Yes.
9 Q. In '64?
10 A. Yes.
11 Q. Irrespective of whether an aerial photograph, somebody
12 reading an aerial photograph will tell you whether
13 or not you were irrigating, you know of your own
14 personal knowledge that you were irrigating.
15 A. Yes, I do.
16 Q. Mr. Walton, there has been comment about standing
17 water in Exhibit U-W. If we could have that photograph,
18 please?
19 Would you look at U-W and locate your sump?
20 A. Yes, I can.
21 Q. Is there standing water in that sump?
22 A. Yes, there is.
23 Q. Is there standing water in the channel that leads from
24 No Name Creek to that sump?
25 A. Yes, there is.

1 Q. Why was that sump developed?

2 A. It was developed for two purposes. It was developed

3 to drain a field to the south of it, and also to

4 utilize the water that was hopefully captured in the

5 sump for irrigation to the field to the east of it.

6 Q. Were there naturally occurring springs in that area

7 of your land at certain times of the year?

8 A. Yes, there were.

9 Q. Do those springs feed that sump?

10 A. Yes, they do.

11 Q. Have you been able to recapture or reclaim some of

12 the land for irrigation purposes by developing that

13 sump?

14 A. Yes.

15 Q. Yes?

16 A. Yes, we have.

17 Q. Has that sump been devised in such a manner that

18 excess water accumulated -- what happens to those?

19 A. Any waters --

20 MR. VEEDER: Object to the question. It is

21 leading, the whole question is entirely leading.

22 THE COURT: The question was what happened to

23 those, wasn't it?

24 MR. PRICE: Yes, sir.

25 THE COURT: Overruled.

1 THE WITNESS: There is an overflow pipe to the
2 northern end of the sump, and when the water level
3 reaches that pipe it flows directly into No Name
4 Creek.

5 Q. (By Mr. Price) And are there times in the spring,
6 are there periods of time during the year when water
7 will appear near the sump on the surface of the land?

8 A. Yes, there is.

9 Q. When is that? Is that spring, summer, fall?

10 A. Okay. It is different for different locations on the
11 field south of the sump.

12 Q. All right.

13 A. In the spring, there are approximately eight to nine
14 acres that are very subirrigated, and this reduces
15 as the summer goes along to the latter part of the
16 summer, and there is probably four or five then.

17 Q. Do you take that into account in connection with your
18 irrigation practices?

19 A. Yes.

20 Q. Is it always possible to set a set of irrigation
21 sprinklers so that water never accumulates on the
22 surface of the land?

23 A. Would you repeat the question, please?

24 Q. Is it always possible in managing your irrigation
25 sets to do it in a fashion that would prevent water

1 from ever accumulating on the surface of the land?

2 A. No.

3 Q. How many acres are we talking about in terms of the
4 area of standing water that Mr. Watson alludes to in
5 Exhibit U-W?

6 MR. VEEDER: Objection to the question, Your
7 Honor. The question is far too vague. The testimony
8 of Mr. Watson went roughly from the Walton house to
9 the very end down to the granitic lip related to the
10 whole waterlogged area, so if he is going to testify
11 in that regard, this is going to take in all the
12 property.

13 MR. PRICE: I will rephrase the question, Your
14 Honor.

15 THE COURT: All right.

16 Q. (By Mr. Price) In the area of the sump, how much
17 acreage is depicted as in standing water?

18 A. From which photograph?

19 Q. Exhibit U-W.

20 A. Approximately one acre.

21 Q. In your irrigation practices, Mr. Walton, do you
22 account or do you not take into account the level of
23 the water on the land?

24 A. Very much so.

25 Q. In terms of your farming the land, do you utilize a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

tractor?

A. Yes, I do.

Q. Is that tractor able to traverse your lands?

A. On the bottom land, approximately 90 to 95 percent of it.

Q. There are portions that cannot be traversed by the tractor; is that right?

A. Yes, there are.

Q. Are there times upon which you would put irrigation water to portions of those lands?

A. Yes.

Q. Would you tell the Court when and why?

A. In August for two reasons: One, my irrigation serves two purposes. One is to supply water to the grass, and two, some of my land is high in alkali. The grass does not grow with a high alkali content, and by supplying slightly more water than the plant needs, all the water for the plant needs are drawn from this, from this water which the plant can totally utilize, and it grows very rapidly and good.

If the plant has to depend upon the water which it draws from the ground, that water is probably nine to 92 in ph, and the plant does not grow from it.

Q. Ph, you are referring to a saline content?

A. Yes.

1 Q. These are items you take into account in your irriga-
2 tion practices?
3 A. Yes, they are.
4 Q. Are you familiar with how many acres the Tribe has
5 under irrigation to the north and south of you at the
6 present time?
7 A. Yes, I am.
8 Q. In the recent years just passed?
9 A. Yes, I am.
10 Q. They are growing alfalfa as well; is that not correct?
11 A. That's correct.
12 Q. And do you have an opinion as to the productivity of
13 your land versus the productivity of their land in
14 terms of --
15 MR. VEEDER: Object to that question. He has
16 laid no foundation whatsoever. This man is not an
17 expert to make any kind of --
18 THE COURT: I think he has been farming in the
19 area for all his life.
20 MR. VEEDER: Is he going to make a calculation
21 as to how much is grown on other land?
22 THE COURT: The question was whether he had an
23 opinion.
24 THE WITNESS: Yes, I do.
25 MR. VEEDER: Well, I object. I say that he is

1 not qualified to come up with an opinion as to the
2 production on the land, and I wish to --

3 THE COURT: Obviously, he is qualified. The
4 question goes to the weight of it, I think, Mr. Veeder.
5 He has been farming up there all of his life.

6 MR. VEEDER: I further wish to bring out this
7 point that in rebuttal that we have gone far afield.
8 There is nothing to -- there is nothing in the record
9 in regard to the comparison of production on the Walton
10 lands with the comparison of production on the Tribal
11 lands, so this is clearly improper under the circum-
12 stances.

13 THE COURT: I don't think that it makes a hell
14 of a lot of difference anyway. What is the reason,
15 Mr. Price?

16 MR. PRICE: The reason is that there have been
17 allegations that there is improper irrigation on the
18 Walton property, and that they can't possibly produce
19 anything.

20 I want to put in that the Tribes do and
21 still produce more productive crop.

22 THE COURT: I am going to permit the testimony.

23 MR. VEEDER: I object to it.

24 THE COURT: Overruled.

25 Q. (By Mr. Price) Mr. Walton, are the Tribal lands upon

1 which we are talking about immediately to the north
2 of you and immediately to the south of you?
3 A. Yes, there are.
4 Q. Do you visually observe the lands to the north of you
5 every day of your life?
6 A. Yes, I do.
7 Q. Are you aware of where the Tribe stores the cut hay
8 or alfalfa?
9 A. Yes, I am.
10 Q. Is it on land right next to your boundary line in
11 part?
12 A. Half of it is.
13 Q. Half of it at the northern portion of their property?
14 A. That's correct.
15 Q. You have an ability to observe the production that
16 they get off their land in comparison with the
17 production out of your land?
18 A. Yes, I do.
19 Q. What is your opinion as to the comparison of the
20 production?
21 A. Very close to equal.
22 Q. Does the Tribe -- is the Tribe irrigating more, less,
23 or the same acres as you are?
24 A. More.
25 Q. The water, the sump that you developed, you augmented

1 the waters that naturally occur there from the wells
2 from diversion from No Name Creek?

3 A. The water from the creek is augmented from the flow
4 of No Name Creek.

5 Q. Did the flow in No Name Creek between 1960, and 1976,
6 have any water pumped into it by any Tribal irrigation
7 project?

8 A. It did for a short period of time in 1974.

9 Q. From a Tribal irrigation project?

10 A. No, from Omak Creek.

11 Q. Was that at the request of the Tribe to run water
12 from Omak down to the lake?

13 A. Yes, it was. I could be in error in that year. I'd
14 have to go back and check it. It might be '74. It
15 might be '72, to '74.

16 Q. Have you and do you or do you not attempt to utilize
17 good conservation practices in connection with the
18 farming of your property?

19 A. Yes, I do.

20 MR. PRICE: I have no further questions.

21 THE COURT: Mr. Veeder, do you have any cross?

22 MR. VEEDER: No, I have no questions, Your Honor.

23 THE COURT: Mr. Sweeney?

24 MR. SWEENEY: No, Your Honor.

25 THE COURT: I had a question, Mr. Walton. I

1 understood you to say that prior to the time that the
2 Tribe installed its pumping facilities up north your
3 entire water supply was furnished by your wells.

4 THE WITNESS: No, Your Honor. Before 1968, the
5 entire water supply was furnished from No Name Creek.
6 In 1968, I located my first well in my northern
7 boundary and irrigated approximately half my irrigated
8 land, and the pump and the sump irrigated the other
9 half, and I have used that well or the other well
10 approximately 200 yards to the west of it from there
11 until now.

12 So, the well irrigates half of the property;
13 the pump and the sump irrigates the other half since
14 '68.

15 THE COURT: All right. But, I had thought someone
16 here testified, or maybe you did, or maybe there was
17 a question asked that you had not pumped from the river
18 or from No Name Creek; it was not necessary for you
19 to do that until the pumping facilities were installed
20 on Tribal lands up north. Did I misunderstand that?

21 THE WITNESS: Maybe I didn't explain it correctly,
22 Your Honor. When the Tribe started pumping to the
23 north of me, they put in their first pump in 1975,
24 latter part of '75, or early '76. At that time, there
25 had been a shortage for me at certain periods of the

1 year in the valley. The shortage shows up both in my
2 well and in the creek flow.

3 THE COURT: I see. All right.

4 MR. PRICE: Your Honor, may I ask a few questions?

5 THE COURT: If that raises any issues that you
6 want to pursue, I just didn't understand exactly what
7 the testimony was.

8 Q. (By Mr. Price) Mr. Walton, in 1949, where did you
9 obtain the water for irrigation purposes?

10 A. From the creek.

11 Q. By virtue of what pumps or --

12 A. In 1949, it was flood irrigation from a dam in the
13 creek.

14 Q. All right. From 1949 up until 1968, did you obtain
15 all the water for irrigation purposes from No Name
16 Creek, the surface waters of No Name Creek?

17 A. Yes, I did.

18 Q. And only after 1968, then did you use a combination
19 of surface flow and well water?

20 A. That's correct.

21 Q. Then, changed to a different well in 1975?

22 A. '73.

23 Q. '73.

24 THE COURT: All right. I think I understand it
25 now.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Anything further, gentlemen?

MR. VEEDER: I have one witness for surrebuttal,
Your Honor.

THE COURT: All right.

MR. VEEDER: I call Mr. Kaczmarek, Your Honor.

While he is doing that, could I have Mr.
Price and Mr. -- copies of the exhibits?

THE COURT: Yes.

MR. VEEDER: May I proceed?

THE COURT: Yes, go ahead, Mr. Veeder.

MICHAEL B. KACZMAREK, recalled as a witness in
surrebuttal by the plaintiff
herein, having been previously
duly sworn, resumed the stand
and testified further as
follows:

DIRECT EXAMINATION

BY MR. VEEDER:

Q. Are you ready, Mr. Witness?

A. Yes, I am.

Q. You have testified in regard to an intensive investi-
gation of the high ground water table on the Walton
property.

1 A. That's correct.

2 Q. Have you an opinion, Mr. Kaczmarek, as to the effect
3 of irrigation of those wet lands by Mr. Walton as just
4 described by him in his testimony? Would you state
5 into the record whether you have an opinion as to the
6 effect of that additional water being put onto the
7 wet lands?

8 A. Yes, I do.

9 Q. Would you state into the record the affects of this
10 additional irrigation on lands that are already wet?

11 A. Yes. The affect of irrigation water that's applied
12 to the wet lands is different for each soil type that
13 we have outlined on Mr. Walton's property, beginning
14 at the granite lip and working north in Allotment 894
15 on the soil unit that is classified as 6SA1-W1. The
16 application of irrigation water to that saline soil
17 simply adds the salt that is present in the irrigation
18 water, and that accumulates with the salt that is
19 already present on the ground by virtue of the fact
20 that the vegetation consumes the water and leaves
21 behind the salt.

22 So, with the absence of drainage which is
23 the case in that particular soil unit due to the
24 presence of the granite lip and the shallow water
25 table, the addition of irrigation to that land or

1 application of irrigation to that land by sprinkler
2 or by flood, either way, results in the addition of
3 more salt to the ground and aggravates the saline-
4 alkaline condition of the soil at that location.

5 Q. What is the affect upon the productivity of the land
6 from the standpoint of increasing the salt on the
7 land by this unnecessary irrigation?

8 A. Well, the addition of soluble salt to the soil
9 decreases the productivity of the land. It makes the
10 land less productive from the standpoint that it limits
11 the types of crops it can grow. They have to be plants
12 that are tolerant to high concentrations of soluble
13 salts, and even plants that are tolerant to saline
14 or alkaline soils suffer reduction in productivity
15 as the salt concentrations increase.

16 So, the ultimate affect of the irrigating
17 of that type of land and in the absence of drainage
18 and the subsequent accumulation of salts is to
19 create a situation of progressive degradation of the
20 productivity of the land.

21 Q. Have you an opinion, Mr. Kaczmarek, having witnessed
22 this area for several years and heard the testimony
23 here, have you an opinion as to whether Mr. Walton
24 is wasting large quantities of water by his practices?

25 A. I couldn't hear your question.

1 Q. Is he wasting -- is Mr. Walton wasting large quantities
2 of water by the practice of irrigating lands that are
3 already wet?

4 A. Mr. Walton is in a situation -- yes. I do have an
5 opinion.

6 Q. Would you state into the record whether you have an
7 opinion whether he is wasteful or not?

8 A. Well, Mr. Walton is in a situation where no matter
9 how carefully he applies water to his lands, he can't
10 avoid wasting a certain amount of water just by the
11 nature of the land the high water table that is
12 there.

13 So, it is definitely my opinion that irriga-
14 tion of that type of land is a very inefficient appli-
15 cation of water, and even with an effort to minimize
16 the loss of water, you are going to waste some every
17 time you irrigate that kind of ground.

18 MR. VEEDER: I have no further questions.

19 THE COURT: Any cross?

20 MR. PRICE: No questions, Your Honor.

21 THE COURT: Mr. Sweeney?

22 MR. SWEENEY: No.

23 THE COURT: Is that all of the testimony now,
24 gentlemen?

25 MR. VEEDER: That is all we have, Your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: All right. I would urge you --

MR. VEEDER: We would rest.

THE COURT: First of all, Mr. Sweeney has some exhibits. I would urge each of you to check with the Clerk and make sure that any exhibits which have been offered have been acted upon before you leave today.

There is one outstanding exhibit that I recall, and that is the diary which was offered.

MR. PRICE: Yes, Your Honor.

THE COURT: I reviewed some of the authorities under Rule 803, and that is a document which is virtually 60 years old. How critical it will be is another question, but I think insofar as having the appropriate of degree of reliability, under Rule 803, Subparagraph 16, considering its age, the nature of it, and such, I am going to admit it as an exception to the Hearsay Rule.

MR. PRICE: Thank you, Your Honor.

THE COURT: Mr. Sweeney?

MR. SWEENEY: Well, Your Honor, I have given counsel copies of these exhibits and also a copy of the exhibit list. The actual numbers of the exhibits do not quite correspond to the listing on the exhibit list, but I have marked in where they do, so 59 is the first one. It says certified copy of

1 probate file for Allotment 525. Actually, it is a
2 copy of a certified copy. We have the original
3 certified copy here for inspection if it is required.

4 No. 60 is a certified copy for Allotment 894,
5 and 61 is a certified copy for Allotment 2371, and
6 similarly as to those three, we are not submitting
7 the certified copies, but we have the certified copies
8 here.

9 THE COURT: I gather counsel have no objections
10 to this?

11 MR. VEEDER: No, I have no objection.

12 MR. SWEENEY: Okay. Now, as to 62, it is a
13 certified copy of the rules and regulations concerning
14 issuance of patents and so forth that were issued
15 by the Department of the Interior, approved October 12,
16 1910, and that is a certified copy of those documents.

17 63 is a certified copy of a file for Allot-
18 ment S-848 -- that was 64?

19 63 is a certified copy for Allotment S-897.
20 Now, those are both certified copies and then 65 is
21 a certified copy of rules and regulations concerning
22 Indian patents approved May 1st, 1922, by the Bureau
23 of Indian Affairs.

24 66 is a certified copy of an Indian Office
25 Circular, and 67 is a copy of certain portions of an

1 Act of 1920, which we are asking the Court to review,
2 and 68 is a copy of a House Report, which would be
3 matters to take judicial notice, and that is all we
4 would have, Your Honor.

5 THE COURT: All right. I understand there is no
6 objection from either party?

7 MR. PRICE: Well, Your Honor, we have no objection
8 to the probate files. I have 59 and 60 and 61 were
9 the three allotments. 62 and 65 were certified copies.
10 I don't know what they will add as exhibits.
11 Apparently, they are the rules and regulations that
12 can be referred to by the government in their briefs
13 if they so choose. I don't know what they add to
14 this proceeding in terms of the irrigable acres. These
15 items seem to go to the question of the original
16 Decision in this case, the transferability of reserved
17 water right to a non-Indian rather than this issue.

18 I also note that Item 67 relates to irriga-
19 tion on Indian Reservations. I don't know for what
20 purpose that is being offered if, again, they want
21 to allude to an Act of Congress, that certainly can
22 be done in a brief or a memorandum.

23 Item 67 and 68, again, I do not know that
24 they purport to relate to the issues before the Court
25 at this time.

1 MR. SWEENEY: I would state to the Court that
2 those later items do refer to the government's
3 brief, the issue raised as to transferability and
4 whether or not there is an intent to transfer a
5 particular case.

6 Those items would go to that, the circulars,
7 the statutes, and so forth.

8 MR. PRICE: I think that item has been decided,
9 Your Honor, and we are beyond that question at this
10 point.

11 MR. SWEENEY: As a matter of law we --

12 THE COURT: I assume that the government, in
13 turn, assumes that this whole issue may eventually
14 be presented to a higher authority?

15 MR. SWEENEY: Well, there is some likelihood.

16 THE COURT: All right. Well, I am going to admit
17 those at this point so we won't have to come back
18 for identification and so forth.

19 In your submission of your post-trial
20 material, you might indicate, Mr. Price, if there is
21 anything you think is prejudicial in those, and I
22 could change my ruling in that regard, or you, Mr.
23 Veeder.

24 MR. PRICE: Thank you, Your Honor.

25 MR. VEEDER: Your Honor, may I ask one question?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Yes.

MR. VEEDER: We would like to withdraw for purposes of reproduction, copies were not served on us of Exhibits RRRR and QQQQ, and all the rest of them. Now, I don't know what Your Honor's rules would be in this regard. We could get them out and get them back very rapidly.

THE COURT: Is there any objection to that from anyone?

MR. SWEENEY: None from the government, Your Honor. We would like to receive copies if he does that.

THE COURT: I tell you if you are going to have copies, I suppose without requiring Mr. Price to so indicate, I gather Mr. Price would prefer if the government took them out and copied them.

MR. PRICE: That is correct.

MR. VEEDER: That is an insult.

THE COURT: It wasn't meant to be an insult.

MR. VEEDER: I would like to have those withdrawn and see if I can get those reproduced this afternoon. I am not sure if they can or not.

THE COURT: We have this conservation plan. Is there any serious issue over that?

MR. VEEDER: Yes, Your Honor. We would object to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

that.

THE COURT: What is the basis of your objection?

MR. VEEDER: I think that we should be in a position to cross-examine the witness who prepared that data. It is not the kind of material that can be normally certified and placed into the record because throughout that entire document, which I have only most cursorily reviewed, there is a series of opinions, some of which may be in conflict with the data that we entered into the record.

Therefore, we object to the filing of it particularly without any explanation as to the content for the benefit of the Court.

THE COURT: Of course, the data, I gather, it is being offered not necessarily to prove the matters set forth in it, but to support Mr. Walton's position that he acted in accordance with the plan; is that correct?

MR. PRICE: Not only that he acted in accordance with the plan, but that he acted to initiate to get the plan in the first place, and then followed it. That is correct, Your Honor.

THE COURT: Well, I will admit it, but insofar as whether this plan is the right system or the wrong system, I won't give it any consideration.

1 MR. VEEDER: Your Honor, there is a reflection
2 in there. May I just for a moment -- I can't remember
3 -- Mr. Blomdahl, is that his name?

4 MR. PRICE: Blomdahl.

5 MR. VEEDER: Your Honor, that is the material
6 here showing land classifications.

7 THE COURT: No, no, Mr. Veeder. What I was
8 saying is that the only purpose that I would admit
9 it without further identification and the right of
10 cross-examination is for the purpose of showing that
11 Mr. Walton did obtain a land plan and proceeded.
12 I wouldn't consider it to show whether the land is
13 fertile or infertile or anything of that nature.

14 MR. VEEDER: Suppose I were to agree that he
15 did have a land plan?

16 THE COURT: Well, I am going to admit it, and
17 then if I see anything objectionable in it, I won't
18 consider it.

19 MR. VEEDER: Well, I have my objection.

20 THE COURT: Yes. That's right.

21 Now, I don't know what your thinking is on
22 how to proceed here. It would be my thought, first
23 of all, that you all check the exhibits to make sure
24 they have all been enacted upon. Secondly, perhaps
25 we should set a schedule for you to propose your

1 respective proposed findings on the ultimate facts,
2 and by that I mean the ultimate facts that are at
3 issue in this proceeding.

4 I would think it might be helpful if you
5 would in proposing the findings of fact in your
6 memoranda to refer the Court to matters which you
7 think each of you contends is in affect res judicata,
8 that was determined by the prior case insofar as it
9 came into issue here.

10 I don't know what time schedule you want
11 on that. Do you have any thoughts? I would like, as
12 you bring this matter on, as reasonably or as
13 reasonably quickly a time as we can. I don't think
14 you are going to have to replot all the ground that
15 has been plowed on previous briefs. I don't mean that.

16 I am thinking more to pull your position
17 together, sort of an oral written argument.

18 MR. PRICE: The figure that comes to mind, Your
19 Honor, to me is 60 days. The reason I say that is
20 that in a single office, it will take some time to
21 coordinate the materials that have come in here and
22 to annotate from the previous transcript where we
23 think that is appropriate to be able to get those
24 materials to you and relate those to the exhibits
25 so we can make an appropriate presentation.

1 THE COURT: What is your thinking, Mr. Veeder and
2 Mr. Sweeney?

3 MR. SWEENEY: That proposal of Mr. Price is
4 satisfactory.

5 MR. VEEDER: Did he say 60 days?

6 MR. SWEENEY: That is what I heard.

7 MR. VEEDER: He would file his opening brief in
8 60 days?

9 MR. PRICE: I don't think anything was said about
10 an opening brief, Your Honor.

11 MR. VEEDER: Well, he has the burden of proof.
12 He should go first.

13 THE COURT: I wasn't thinking so much as a brief,
14 Mr. Veeder, but as proposed findings with reference
15 to the record that we have made here, together with
16 anything that is pertinent in the earlier record on the
17 issues, and then I don't mean to say that you couldn't
18 -- we couldn't schedule oral argument at such time
19 as you think is appropriate.

20 MR. PRICE: I would ask that we have set a date
21 that we all respond.

22 THE COURT: Why don't we have a date where you
23 each respond, and then you could have a date if some-
24 thing new comes up in the other person's response, you
25 can respond to it?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. VEEDER: These are going to be proposed findings of fact and conclusions of law?

THE COURT: Whatever label you want to put on them. They can be proposed findings would be helpful in view of counsel's familiarity with the previous record and my lack of familiarity with it. It doesn't mean that you cannot, and I think you probably should, comment. That is why I say it should be annotated or in your proposed findings you would also indicate the portions of the record that you think support that particular finding.

Insofar as briefs are concerned and the law, I don't know that you need to submit any more. We have got more cases now than I can possibly read, but I will leave that up to you. That may raise another question that you might want to consult one another on; the necessity or lack of necessity of any further interim order pending a resolution of this matter, and the necessity or lack of necessity of a water master.

MR. VEEDER: May I be heard on that? I think without a water master, if Mr. Walton is going to be permitted to divert water we pump into the stream, I think that that is in the form of an injunction against the Tribe, and I would ask that a bond be

1 posted in accordance with the Rules of Civil Procedure
2 and in accordance with the law.

3 THE COURT: Well, wait a minute now. I was
4 talking about a water master. What do you think
5 about that?

6 MR. VEEDER: Well, if Mr. Walton is going to take
7 water --

8 THE COURT: Well, my inclination is to maintain
9 a status quo. We have been doing this for years,
10 and there is no reason to change anything substantially
11 now.

12 I think until this matter has been fully
13 resolved, and then I can get down to draft what I
14 think is a proper solution to it, that we should
15 maintain as much as we can a status quo.

16 Now, if you feel that a water master is
17 going to be necessary in order to assure that water
18 is not wasted and to check the measurements and so
19 forth, I will appoint one.

20 MR. PRICE: Your Honor, I don't believe a water
21 master is necessary. We have, apparently, accurate
22 monitoring mechanics in place. The USGS is making
23 those measurements. We know how we have operated in
24 the past. I think the parties can continue to
25 operate for the next 60 days --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: Mr. Sweeney?

MR. PRICE: -- without prejudice to one another.

MR. SWEENEY: Well, Your Honor, we are not as intimately involved as the Tribe and Mr. Walton are. Traditionally, it has been towards the end of the irrigation season where the water masters have been called upon.

THE COURT: You think we may be able to defer that for the moment?

MR. SWEENEY: Well, in '79, it was July, and then into August, I think, that we had the marshals out and all that, so I think perhaps we could defer that.

THE COURT: Mr. Veeder, Mr. Sweeney suggested perhaps if a master is perhaps going to be necessary that perhaps wouldn't be that urgent in time.

MR. VEEDER: The problem with which we have always been confronted is to determine the quantity of water that Mr. Walton is taking, and where he is taking it and, of course, the quantity of water that is being taken because we think we are entitled to be paid for the water that he is taking.

Now, if there is an agreement that we could have access to make appropriate measurements on the Walton property bearing in mind the USGS just takes a

1 mechanical -- they just take down numbers; they don't
2 figure, for example, they simply date the measurement,
3 the meter measurements on Mr. Walton's sump. There
4 is no record that we know of in regard to the diversions
5 Mr. Walton makes, for example, at what we call diver-
6 sions D-1 and D-2.

7 He has released water off into those water-
8 logged areas and large quantities of water, and our
9 view is that we should have, if he is going to do that,
10 if we are going to go through the summer this way,
11 we should have access as to the quantity of water that
12 he is diverting, where it is being diverted, and
13 have our people -- we will select somebody to go on
14 and make the measurements so we will know what he is
15 doing.

16 MR. SWEENEY: You mean there are no recording
17 devices there, measuring devices?

18 MR. VEEDER: That's correct.

19 MR. SWEENEY: On D-1 and D-2?

20 MR. VEEDER: Just cut a hole in the creek and
21 away she goes.

22 MR. SWEENEY: Would the Tribe provide those
23 devices?

24 MR. VEEDER: I think we could.

25 THE COURT: Well, if you can provide those devices

1 maybe the government people can go monitor those while
2 they are doing the other work.

3 MR. SWEENEY: Along with the Tribe, yes.

4 MR. VEEDER: You would have USGS do that?

5 MR. SWEENEY: I would ask USGS to include those
6 additional measuring devices in their report that
7 they make in their report. Of course, the Tribe can
8 make its own as it does. It goes out and also takes
9 the same measurements, records the same data.

10 MR. VEEDER: Would we have access for that purpose?

11 MR. PRICE: Mr. Walton indicates that there
12 probably wouldn't be any irrigation from those points
13 within the next 60 days, but if there is and the USGS
14 wants to install some measuring devices, we certainly
15 have no objections if the USGS wants to do that.

16 MR. VEEDER: I can't hear what he's saying.

17 THE COURT: You have got to speak up a little
18 bit, Mr. Price. I will repeat it. What he is saying
19 is Mr. Walton does not intend to irrigate in those
20 areas during the next two months.

21 MR. VEEDER: Will Counsel stipulate on the record
22 that he will not irrigate on those two diversions?

23 THE COURT: I understood that's what he said,
24 isn't it, Mr. Price?

25 MR. WALTON: As long as the temperature -- I can't

1 say what the summer is going to do, Your Honor. With
2 normal temperatures, I don't anticipate irrigating
3 those points.

4 THE COURT: Well, let's put it this way: If
5 you do, and perhaps Mr. Price, I would notify Mr.
6 Sweeney and if the government wants to put on monitor-
7 ing devices they would do that and include those
8 results in their report.

9 MR. SWEENEY: Yes, Your Honor.

10 MR. VEEDER: Your Honor, we are in this position
11 that Mr. Walton has done this in the past. He has
12 opened up these ditches and let water run out of
13 these places.

14 THE COURT: If you want to put devices on them
15 now, I don't suppose he would care.

16 MR. PRICE: We only would allow it in the sense
17 that the United States Geological Survey put them
18 in, Your Honor.

19 THE COURT: Are you agreeable to that?

20 MR. SWEENEY: Yes, I will talk to them this
21 afternoon.

22 THE COURT: All right. We won't have to worry
23 about trying to irrigate or not.

24 I may be getting some other communication
25 out to you myself as I have time to go back through

1 and review this material while it is fresh in my
2 mind, but I guess that will give us an opening
3 basis for a while.

4 You have a schedule now in which to respond
5 or propose your findings and your references to the
6 record, and hopefully, we can get this matter in a
7 position where it is resolved at this level in any
8 event before too long.

9 Anything further, Mr. Sweeney, Mr. Price,
10 Mr. Veeder?

11 MR. SWEENEY: Nothing, Your Honor, from us.

12 MR. PRICE: The remaining issue of Wilson Walton,
13 Your Honor.

14 THE COURT: Oh, yes.

15 MR. PRICE: We would like the opportunity to
16 have a few days on that and consider that and
17 possibly defer as to whether or not there would be a
18 need for a deposition or for a few hours here.

19 THE COURT: When I denied the plaintiff's motion
20 for a continuance a week or two ago, there was an
21 indication that Mr. Walton would be unable to testify.
22 I understand he testified in the previous hearing, and
23 Mr. Price wants the opportunity to evaluate that
24 testimony and if it is necessary for him to testify
25 further, I suppose it could be done by deposition,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

couldn't it?

MR. PRICE: It could be, Your Honor.

THE COURT: Or, it could be done, I suppose, you might if he is going to give additional testimony, you might give a summary of that to Mr. Veeder and Counsel in advance.

MR. PRICE: All right.

THE COURT: So that then we can look at that to see. It may not be necessary to call him.

MR. PRICE: That may be a possibility, Your Honor.

THE COURT: All right.

MR. VEEDER: Then, we will be served as to what he is going to testify to?

THE COURT: Just a summary of what his testimony will be so they can evaluate that.

MR. PRICE: We will provide you that, Counsel.

THE COURT: All right. Counsel, I guess we will proceed on that basis. Thank you.

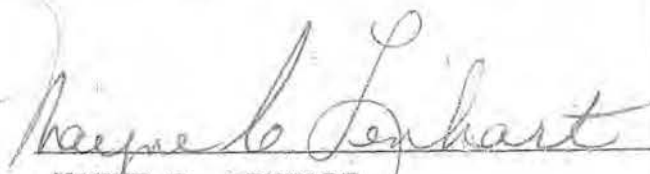
* * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I do hereby certify that the foregoing is
a true and correct transcript of notes taken in my behalf
by Mia M. Bohn, Freelance Court Reporter, in the entitled
proceedings and on the date stated.

I further certify that the transcript was
prepared by Mia M. Bohn or under her direction at my
request.



WAYNE C. LENHART
Official Court Reporter
